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FIRST GENERAL COUNSEL'S REPORT

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SOURCE:

Sua Sponte Submission

RESPONDENTS:

ACPAC ACA International Political Action
Committee and Rae Ann Bevington in her
official capacity as treasurer ("ACPAC")

ACA International ("ACA")

Michael Henke (former ACA V.P.-Finance
and former ACPAC Assistant Treasurer)

Jean Cottington (former ACPAC Treasurer)

Marilyn Cerini

**RELEVANT STATUTES
AND REGULATIONS**

2 U.S.C. § 432(g)

2 U.S.C. § 433(c)

2 U.S.C. § 434(b)

2 U.S.C. § 437g(a)

2 U.S.C. § 441b(a)

2 U.S.C. § 441f

11 C.F.R. § 102.7(a)

11 C.F.R. § 104.3(b)

11 C.F.R. § 110.4(b)

11 C.F.R. § 114.2(b), (d), (e)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

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I. INTRODUCTION

This matter comes before the Commission on the *sua sponte* submission of ACA International ("ACA"), a non-profit corporate trade association, and ACPAC ACA International Political Action Committee ("ACPAC"), its separate segregated fund ("SSF").¹ The Submission concerns various apparent violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), arising primarily from the activities of Michael Henke, a former Vice President of ACA and former Assistant Treasurer of ACPAC.

According to the Submission, Henke unlawfully transferred \$23,419 in corporate funds from ACA to ACPAC on November 12, 2010, to conceal what Henke mistakenly believed was a shortfall in the account of ACPAC. Acting with the assistance of other members of his staff, Henke sought to obscure ACPAC's receipt of those corporate funds by falsely indicating that ACPAC donors who contributed less than their \$5,000 contribution limit had made additional contributions to ACPAC, which Henke caused to be reported inaccurately to the Commission as such. After Henke later learned that there was, in fact, no shortfall, he attempted to reverse the transfer on January 20, 2011, by issuing a backdated check from ACPAC to ACA to coincide with the date of the original transfer. Henke's efforts to conceal that transfer in turn caused ACPAC to report falsely to the Commission that the \$23,419 was a refund to the sham contributors who Henke and his staff had associated with the prior transfer.

In addition to the allegations relating to transfers between ACA and ACPAC, the Submission asserts that ACPAC filed incorrect reports with the Commission concerning an apparent theft of \$2,950 from ACA by a former employee, Marilyn Cerini.

¹ See ACA/ACPAC *Sua Sponte* Submission (Dec. 21, 2011) (the "Submission"). Rae Ann Bevington is the current designated treasurer for ACPAC. See ACPAC, Amended Statement of Organization (June 28, 2012). Accordingly, our references to ACPAC in this Report also include Bevington acting in her official capacity as treasurer.

1 Having considered the Submission and the relevant Responses, we recommend that the
2 Commission find reason to believe (1) that ACA made a prohibited corporate contribution and a
3 prohibited contribution in the names of others to ACPAC in violation of 2 U.S.C. §§ 441b(a) and
4 441f; (2) that ACPAC accepted the prohibited corporate contribution of ACA made in the names
5 of others and filed inaccurate disclosure reports with the Commission, in violation of 2 U.S.C.
6 §§ 441b, 441f, and 434(b); and (3) that Michael Henke knowingly and willfully consented to the
7 making of a prohibited corporate contribution in violation of 2 U.S.C. § 441b(a) and 11 C.F.R.
8 § 114.2(e) and that he knowingly and willfully caused prohibited contributions to be made in the
9 names of others in violation of 2 U.S.C. § 441f and 11 C.F.R. § 110.4(b)(1)(iii).² We further
10 recommend that the Commission take no action as to potential violations on the part of
11 ACPAC's former treasurer Jean Cottington — who was unaware of Henke's actions — and as to
12 the ACA subordinate employees who assisted Henke. We also recommend that the Commission
13 take no action as to potential violations on the part of ACPAC and former ACA Assistant
14 Controller Marilyn Cerini in connection with the embezzlement scheme.

15 II. FACTUAL SUMMARY

16 A. Respondents

17 ACA is an incorporated, not-for-profit trade association servicing businesses and
18 individuals in the credit and collection industry.³ ACPAC is its SSF, registered with the
19 Commission as an unauthorized, qualified, non-party committee, and Rae Ann Bevington is
20 ACPAC's current Treasurer (collectively, the "Committee"). Jean Cottington was the treasurer

² We also recommend that the Commission take no action as to a potential section 434(b) violation of Michael Henke in his capacity as Assistant Treasurer of ACPAC.

³ See <http://www.acainternational.org/> (last visited on Apr. 17, 2014).

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1 for ACPAC from April 15, 2008, to April 25, 2011, the period at issue.⁴ In addition to her
2 former role as Treasurer, Cottington was ACA's Director of Legislative and Grassroots Affairs
3 until she was dismissed in April 2011 for failing to adequately supervise ACPAC's filings with
4 the Commission.⁵

5 Michael Henke was ACA's Vice President of Finance from 2004 until he was dismissed
6 in April 2011 in connection with ACA's internal inquiry concerning this matter.⁶ In April 2008,
7 ACPAC designated Henke as its Assistant Treasurer with the Commission.⁷ In a deposition
8 taken in connection with Cottington's civil employment action, Henke testified that he was
9 unaware ACPAC had so designated him.⁸ Nonetheless, Henke acknowledged that he was

⁴ Between Bevington and Cottington, Patrick Morris served as ACPAC's Treasurer from April 23, 2012, to June 28, 2012, Adam Peterman served in that role from September 15, 2011, to April 23, 2012, and Valerie Hayes was Treasurer for ACPAC from April 25, 2011 to September 15, 2011.

⁵ On June 13, 2011, Cottington filed a wrongful termination lawsuit against ACA. See Cottington Amended Resp. (Feb. 21, 2012) (attaching Cottington Civil Complaint, *Cottington v. ACA Int'l*, Civ. No. 27-11-12748 (June 13, 2011) (4th Judicial Dist. Ct., Hennepin County, MN) ("Cottington Civil Compl."); Memorandum of Law in Support of Motion for Partial Summary Judgment on Whistleblower Claim, Civ. No. 27-CV-11-12748 (Feb. 13, 2012) (4th Judicial Dist. Ct., Hennepin County, MN) ("Cottington Motion Partial Summary Judgment Memo") (attaching excerpted copy of Dep. of Jean Cottington) (Oct. 18, 2011) ("Cottington Dep."); Amended Civil Complaint, *Cottington v. ACA, Int'l*, Civ. No. 27-11-12748 (January 19, 2012) (4th Judicial Dist. Ct, Hennepin County, MN) ("Cottington Amended Civil Compl."). The District Court issued a protective order on August 5, 2011. See Cottington Resp. (Feb. 17, 2012) (attaching Stipulation for Protective Order and Proposed Protective Order (filed on Aug. 8, 2011). As basis for her suit, among other things, Cottington claimed that she was unaware that Henke had transferred corporate funds to ACPAC or that ACPAC's disclosure reports consequently contained false information. Cottington Amended Civil Compl. ¶¶ 8, 15-17, 21-23, 23-25. ACPAC's counsel has advised in connection with its Submission that the parties resolved the employment action through a confidential settlement agreement. See E-Mail from Nancy Hylden, ACPAC, to Kimberly Hart, FEC (June 12, 2012) ("Hylden June 12, 2012 E-Mail").

⁶ The Submission did not provide a complete account of Henke's activities in connection with the transfer of funds from ACA to ACPAC. See Submission at 3. ACPAC's counsel has represented that the Committee was hampered in its effort to make a full submission by the departure of many of the individuals with personal knowledge of relevant facts. After it made the submission, however, it obtained Henke's deposition testimony in connection with Cottington's civil action and has since provided additional information through counsel concerning Henke's transfer of funds from ACA to ACPAC.

⁷ See ACPAC, Amended Statement of Organization (Apr. 15, 2008); see also Cottington Civ. Compl. ¶ 18 (June 13, 2011); E-Mail to Kimberly Hart, FEC from Nancy Hylden, Esq., ACPAC Counsel, dated May 16, 2012 ("Hylden May 16, 2012 E-Mail") (referring to Henke as ACPAC's Assistant Treasurer).

⁸ See Hylden June 11, 2012 E-Mail (attaching Dep. of Michael Henke at 53:21-:25, 54:1-:2 (Dec. 8, 2011) ("Henke Dep.")).

1 responsible for oversight of all financial accounting, but could not specifically recall whether he
2 consulted with ACPAC Treasurer Cottington prior to engaging in significant actions involving
3 ACPAC's bank account.⁹ Henke also contends in his Response that he had no responsibility for
4 ACPAC's reporting obligations with the Commission.¹⁰

5 Marilyn Cerini was ACA's Assistant Controller from March 2003 until her termination
6 on September 29, 2010.¹¹ In early 2010, among other things Cerini was responsible for certain
7 internal bookkeeping functions related to the ACPAC bank account.¹² After her termination, in
8 October 2010, ACA discovered that between January and May 2010, Cerini had improperly
9 diverted \$2,950 from the ACPAC account to personal accounts under her control.¹³ The
10 Committee reported the matter to local law enforcement authorities, and Cerini was charged with
11 felony theft.¹⁴

12 **B. ACA's Contributions to ACPAC Through Fictitious Disclosures**

13 The discovery of Cerini's theft led Henke and other members of the accounting
14 department to conduct a more comprehensive review of the Committee's records, which
15 suggested that ACPAC's ledger reflected a surplus of \$23,419 over ACPAC's bank balance.¹⁵
16 Apparently to bring the books into balance, ACPAC's ledger subsequently included an October

⁹ See, e.g., Henke Dep. at 44:15-:22, 76:6-:20, 79:8-:18.

¹⁰ Henke Resp. at 1. (Jan. 24, 2012).

¹¹ Submission at 1.

¹² *Id.* at 2.

¹³ *Id.*

¹⁴ *Id.* at 1-2, Exs. A, B. Cerini's criminal case ultimately was diverted to an alternative program for first-time property offenders, and she was required to pay restitution to ACPAC. *Id.*

¹⁵ Henke Dep. at 73:11-:25, 74:1-:25, 75:1-:25.

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31, 2010, accounting entry reducing the ledger balance by \$23,419.¹⁶ Neither the Submission nor any other information in the record indicates who made that entry.¹⁷ Notwithstanding that accounting reduction, on November 12, 2010, Henke sought to address the perceived imbalance by transferring \$23,419 by wire from ACA's general treasury account to ACPAC's bank account.¹⁸ The Submission states that, although the "apparent surplus" instigated the transfer of funds from ACA to ACPAC, they cannot explain the apparently duplicative efforts to resolve the same imbalance.¹⁹

In his Response, Henke asserted that a temporary consultant hired to help reconcile the ACPAC account after Cerini's embezzlement "thought a transfer of funds needed to be made from ACA International to ACPAC based upon his limited knowledge."²⁰ Henke's Response does not specifically address whether he made the transfer.²¹ In his subsequent testimony in the Cottingham civil action, however, Henke claimed that he transferred the \$23,419 from ACA's

¹⁶ Submission at 3.

¹⁷ *Id.*

¹⁸ Henke Dep. at 74:10-:25, 75:1-:25.

¹⁹ Submission at 3 n.5; see also See E-Mail from Nancy Hylden, ACPAC Counsel, to Kimberly Hart, FEC (July 13, 2012) ("Hylden July 13, 2012, E-Mail").

²⁰ Henke Resp. at 2. Counsel for the Committee explained that the temporary accountant was Ray Mularie who worked with ACA from late October 2010 through early December 2010. See Hylden July 13, 2012 E-Mail. The Committee has had no contact with Mularie since that time. *Id.* Mularie worked primarily on reconciling bank and cash accounts. *Id.* The Committee asserts that Mularie had no special knowledge of the Act or Commission regulations and was unlikely to have been aware of restrictions relating to commingling corporate treasury funds and PAC funds. *Id.* Counsel states that ACA did not enter into a written contract with Mularie and that the source of its information concerning his involvement is the recollection of other staff employees. *Id.*

Counsel further states that the three members of the accounting department who had access to the website through which the wire transfer would have originated were Henke, Pam Butera (Accounting Coordinator), and Katelyn Pearsall (Accounting Assistant). See E-Mail from Nancy Hylden, ACPAC, to Kimberly Hart, FEC (May 16, 2012) ("Hylden May 16, 2012 E-Mail"). Therefore, it appears that Mularie, a temporary employee, lacked the access necessary to transfer the funds on his own.

²¹ Henke Resp. at 1-2.

1 corporate account on the advice of Ray Mularie, who was hired to reconcile ACA's accounts and
2 had concluded that ACPAC's funds had mistakenly been deposited into ACA's account.²²

3 Moreover, Katelyn Pearsall, another ACA employee who Henke supervised, asserted in a
4 sworn statement provided to the Commission in conjunction with the Submission that she was in
5 the office when the Henke accessed ACA's account through its bank's website to transfer the
6 funds to ACPAC.²³ She also stated that Henke told her immediately afterwards that the
7 transaction had been completed.²⁴ Pearsall further stated that she understood, based on what
8 Henke told her, that the purpose of the transfer was to reconcile ACPAC's bank account balance
9 with the cash-on-hand balance reported to the Commission in connection with ACPAC's
10 disclosure reports, which appeared to be overstated by the same amount.²⁵

11 According to the Submission and supporting statements, on November 12, 2010, the date
12 of the transfer from ACA to ACPAC, Henke also instructed Pearsall and Michelle Andrew —
13 another accounting department employee who Henke supervised — to identify ACPAC donors
14 falsely as the original source of the funds that ACA transferred to ACPAC.²⁶ In their statements,
15 Pearsall and Andrew both contend that Henke directed them to create those false records.²⁷ They

²² Henke Dep. at 75:4-:25.

²³ Aff. of Katelyn Pearsall at 2 (June 15, 2012) ("Pearsall Aff.") (attached to E-Mail from Nancy Hylden, ACPAC Counsel to Kimberly Hart, FEC (June 15, 2012).

²⁴ *Id.* at 2-3.

²⁵ *Id.* at 3.

²⁶ Submission at 3-4; Aff. of Michelle Andrew at 4-6 (June 15, 2012) ("Andrew Aff.") (attached to E-Mail from Nancy Hylden, ACPAC Counsel to Kimberly Hart, FEC (June 15, 2012); Pearsall Aff. at 4. Pam Butera, who also worked under Henke's supervision, stated in a sworn statement provided to the Commission in connection with the Submission that she was not aware of or involved in Henke's November 12, 2010, transfer. Aff. of Pam Butera at 2-3 (June 21, 2012) ("Butera Aff.") (attached to E-Mail from Nancy Hylden, ACPAC Counsel to Kimberly Hart, FEC (June 21, 2012).

²⁷ Andrew Aff. at 4-5; Pearsall Aff. at 4.

1 explain that Henke instructed them first to identify ACPAC contributors who had not met their
2 annual aggregate contribution limit of \$5,000, and then to record fictional contributions from
3 regular or frequent contributors on that list in amounts that would not exceed those individuals'
4 annual aggregate contribution limits.²⁸

5 They falsified seven such contributions in the manner Henke described, accounting for
6 \$22,399 in alleged contributions along with an eighth contribution for \$250 falsely attributed to
7 ACPAC contributor Debra Bates days later, but the total amount fell short of the \$23,419
8 transferred from ACA by \$770.²⁹ Consequently, Andrew and Pearsall recorded an additional
9 \$770 in the form of unattributed cash contributions to balance the figures.³⁰ In addition, several
10 months later, Andrew permitted her own name to be used in connection with another \$250
11 contribution that was unrelated to the scheme to create an accounting justification for the
12 \$23,419 transfer from ACA to ACPAC.³¹

²⁸ Andrew Aff. at 4; Pearsall Aff. at 4.

²⁹ Submission at 3-4; Hylden July 13, 2012 E-Mail (explaining the circumstances of the creation of the eighth contribution).

³⁰ Submission at 4. ACPAC states that its internal contribution tracking software program indicates that the cash contributions were received on November 16, 2010. *Id.* The \$770 in cash contributions were not recorded in the ACPAC ledger, however, and no correlating cash contributions were deposited into the ACPAC bank account. *Id.*

³¹ Andrew Aff. at 4-5. Henke and his staff discovered a \$250 contribution made in October 2010 by an undesignated contributor. Henke Dep. at 43:13-19. Henke stated that they "spent days trying to figure out who that contribution was from." Henke Dep. at 43:18-19. Andrew similarly stated that "Mike Henke, Katelyn, and I scoured accounting records looking for an individual's name to tie to the \$250, and Mike Henke told me to use my name." *See* Cottingham Amended Resp. (attaching excerpted copy of Deposition of Michelle Andrew at 48:16-19 (Dec. 7, 2011)) ("Andrew Dep.") Andrew states that "she did not say no" to Henke's suggestion that she use her name but responded "I said fine; what should I do." Andrew Dep. at 108:12-13. An Amended 2010 Pre-General Report filed February 7, 2011, itemized that \$250 contribution in Andrew's name. *See* Amended 2010 Pre-General Report (Feb. 7, 2011). ACPAC did not include any information regarding this activity in its Submission. *See* Submission, generally. OGC became aware of the \$250 contribution through our review of documents Cottingham provided in connection with her civil employment action. *See, e.g.,* Andrew Dep. at 48:1-25; Cottingham Amended Resp. (Feb. 21, 2012) (attaching excerpted copy of Deposition of Kathleen Molitor at 37:10-21 (Dec. 20, 2011)) ("Molitor Dep.") According to counsel, ACA only became aware of Andrew's actions concerning this unrelated \$250 contribution after ACA made its Submission to the Commission. *See* Hylden July 13, 2012 E-Mail.

1 In his deposition, Henke acknowledged his responsibility for associating contributor
2 names with false contributions. He testified that he instructed Pearsall and Andrew to
3 "temporarily assign names" to the \$23,419 in contributions transferred to ACPAC's account for
4 disclosure reporting purposes.³² He explained that he sought to "buy . . . time to get the bank
5 accounts reconciled and these [reports] were going to be refiled anyway."³³ He also admitted
6 that he was aware that false contributions would consequently be included among the
7 Committee's disclosures in a report filed with the Commission, but anticipated disclosing
8 accurate information later in the reports.³⁴

9 In addition to seeking to disguise the true nature of the transfer from ACA to ACPAC
10 generally, Henke also sought to conceal the activity internally. According to Andrew, Henke
11 instructed other staff members, including Andrew and Pearsall, not to discuss or reveal to
12 Cottingham details related to the prohibited transfer.³⁵ Andrew testified that Henke consistently
13 directed them throughout the process "don't tell Jean about this," or "we can't tell Jean" about
14 the falsified contributions.³⁶ Henke conceded as much in his testimony, stating that he did not
15 inform Cottingham about the transfer and instructed Andrew not to do so either until they "got it
16 figured out."³⁷

³² Henke Dep. at 94:18-25, 95:1-25, 96:1-6.

³³ *Id.* at 94:23-25, 95:1-3.

³⁴ *Id.* at 94:18-25, 95:1-25, 96:1-3.

³⁵ See Andrew Dep. at 106:7-25, 107:1-5 (explaining how Henke specifically instructed Andrew and Pearsall on numerous occasions not to discuss or reveal to Cottingham details related to the records in the Committee's disclosure reports).

³⁶ *Id.*

³⁷ Henke Dep. at 79:8-25, 80:1-13.

On December 2, 2010, then-Treasurer Cottington filed the original 2010 Post-General Election Report that itemized \$22,649 in contributions that Henke and his staff fabricated, as well as \$770 in cash contributions among other unitemized cash contributions disclosed in that filing.³⁸ Table 1 identifies the itemized and un-itemized transactions that ACPAC falsely reported to the Commission.³⁹

Table 1. — Fictitious Contributions Reported in 2010 Post-General Report

Reported Date	Reported Contributor	Reported Amount
11/12/2010	Irwin Bernstein	\$5,000
11/12/2010	Beverly Bunton	\$2,399
11/12/2010	Darin Bunton	\$2,500
11/12/2010	Larry Geier	\$1,000
11/12/2010	Michael Klutho	\$5,000
11/12/2010	Mary Rickman	\$1,500
11/12/2010	Gary Williams	\$5,000
11/16/2010	Debra Bates	\$250
11/16/2010	Cash Contributions	\$770
	TOTAL	\$23,419

After Cottington filed the 2010 Post-General Report, Henke determined that the perceived imbalance in ACPAC's books stemmed from an accounting irregularity and that no \$23,419 shortfall in the PAC account existed.⁴⁰ Thus, to remedy the discrepancy in the books that resulted from the previous "remedial" transfer, on January 20, 2011, Henke directed staff to

³⁸ Submission at 4; *see* ACPAC, 2010 Post-General Report (Dec. 2, 2010).

³⁹ The information in Table 1 is premised on information in the Committee's subsequent amendment of its reports and other information the Committee provided in connection with its Submission.

⁴⁰ Submission at 4; *see* Henke Dep. at 75:4-8. According to Henke, when it became apparent that ACPAC could not match any incoming contributions to the transfer amount, he had no choice but to reverse the transfer. *Id.* at 75:4-8. Henke stated that he must have informed other ACA corporate officers of the transfer, but could not identify any person whom he notified. *Id.* at 79:16-25, 80:1-2.

1 issue a check from ACPAC to ACA payable in the amount of \$23,419 and backdated to
2 November 12, 2010 — the date of the initial transfer.⁴¹ The correlating ACPAC ledger entry
3 reflecting that return of funds also was backdated to November 12, 2010.⁴²

4 On January 31, 2011, after Henke reversed the initial unlawful transfer, Cottington filed
5 the 2010 Year-End Report for ACPAC, which falsely described the return of those funds to ACA
6 as "Refunds of Contributions to Persons Other Than Political Committees" in the amount of
7 \$23,419 to the contributors who Henke and his staff had associated with the spurious
8 contributions.⁴³ In fact, ACPAC issued no such refunds to any of the putative contributors.
9 Cottington does not deny that in her official capacity as Treasurer of ACPAC she filed the
10 original 2010 Post-General and 2010 Year-End Reports that inaccurately described the transfers
11 of ACA's corporate funds to ACPAC and back as contributions received from and refunded to
12 the falsely identified individuals.⁴⁴ She nonetheless asserts that Henke concealed information
13 from her that would have alerted her to the falsity of those reports.⁴⁵

14 On February 7, 2011, the Committee amended its 2010 Post-General Report to reflect
15 seven of the eight falsified contributions that the original 2010 Post-General had identified.⁴⁶
16 Also on February 7, 2011, the Committee filed an Amended 2010 Year-End Report disclosing
17 the refund of all eight falsified contributions totaling \$22,649 as well as the \$770 in un-itemized

⁴¹ Submission at 4; see Hylden July 13, 2012 E-Mail. Pam Butera, another Henke subordinate on the accounts payable staff of ACA, stated in a statement that Henke instructed her in January 2011 to issue a check from ACPAC to ACA backdated to November 12, 2010. See Butera Aff. at 2.

⁴² Submission at 4.

⁴³ *Id.* at 5; see *supra* Table 1. The remaining \$770 in supposed cash contributions would not have been reflected as refunds to specific individuals but rather as un-itemized refunds of contributions.

⁴⁴ Cottington Amended Resp. at 2-3.

⁴⁵ *Id.*

⁴⁶ ACPAC, Amended 2010 Post-General Report (Feb. 7, 2011).

1 cash contributions.⁴⁷ Cottington contends that Henke filed the February 7, 2011 Amended 2010
2 Post-General and Year-End Reports electronically on his own initiative as the Assistant
3 Treasurer of ACPAC using her Commission password and without notifying her or providing
4 them to her for review prior to filing them with the Commission.⁴⁸ Henke disputes that claim,
5 asserting that Dan Puhl — a temporary consultant hired to assist the Committee in reconciling its
6 accounts⁴⁹ — filed them.⁵⁰

7 Cottington asserted in her civil action that her role as Treasurer was limited to ensuring
8 that the Committee's reports with the Commission were properly filed.⁵¹ She claimed that when
9 ACA retained her, ACA executives informed her that Henke and his staff would be responsible
10 for assembling and preparing the reports for filing.⁵² She further contended that she believed
11 Henke was suited to that role, given his finance and accounting background and his access to the

⁴⁷ ACPAC, Amended 2010 Year-End Report (Jan. 31, 2011). The Submission does not explain, and we are unable to determine, why the February 7, 2011, Amended 2010 Post-General Report failed to include one of the false contributions — a \$2,500 contribution falsely attributed to Darin Bunton — or \$100 of the previously reported cash contributions, while the Amended 2010 Year-End Report reflects refunds of the entire \$23,419 amount of the transfer.

⁴⁸ Cottington Amended Resp. at 2-3.

⁴⁹ See Henke Dep. 42:7-13, 82:3-7; Cottington Amended Civil Compl. ¶ 18. The Committee indicates that, based on a review of Henke's e-mails, ACA's first contact with Puhl appears to have been on October 13, 2010, and that he visited ACA's main office on several occasions afterwards. Hylden July 13, 2012 E-Mail. The Committee has not had any contact with Puhl since mid-March 2011. *Id.*

⁵⁰ Henke Dep. at 84:16-25, 85:1-23. Further, Henke says that they did not show their work to Cottington and that Puhl filed the amended reports using Cottington's signature. *Id.* In assessing these claims, the Committee reviewed various Henke e-mails that suggested that Puhl may have assisted with the preparation of ACPAC's disclosure reports and may have submitted some of them using Cottington's password. Hylden July 13, 2012 E-Mail. But because neither Cottington, Henke, nor Puhl remained employed by ACA when it conducted its internal review, the Committee could not conclude with certainty whether Puhl was otherwise involved in the effort to falsify contribution records or in fact filed the amended reports, as Henke contends. *Id.* Even if Puhl filed those amended disclosure reports as Henke claims, he would not be liable under the Act for a reporting violation because he was not a treasurer. Further, whatever Puhl's role in filing the amendments on February 7, 2011, it is clear that Henke directly authorized and participated in the effort to conceal the illegal transfers of funds between ACA and ACPAC as false contributions and false refunds to contributors.

⁵¹ Cottington Amended Civil Compl. ¶¶ 7-8.

⁵² Cottington Dep. at 30:1-25, 31:1-25.

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1 Committee's financial information as the Assistant Treasurer and as Vice-President of Finance
2 for ACA.⁵³ According to Cottington, ACA executives assured her that she could rely upon the
3 work of the staff, and particularly Henke.⁵⁴ Because of this arrangement, Cottington asserts that
4 she had limited access to the accounting department's documents and was not shown "formal
5 records of deposits or things like that."⁵⁵

6 Cottington indicated that she first became aware of the details of Henke's conduct during
7 an April 2011 meeting with Andrew.⁵⁶ Andrew's deposition testimony is consistent with that
8 assertion.⁵⁷ After speaking with Andrew, Cottington arranged to have a conference call with
9 ACA President Martin Sher and ACA Vice-President Tom Stockton.⁵⁸ That call was scheduled
10 for April 14, 2011, but Cottington was unavailable and asked her husband to "brief" Sher and
11 Stockton about the false reports filed with the Commission.⁵⁹ On April 15, 2012, in a

⁵³ Cottington Dep. at 30:1-:25, 31:1-:25.

⁵⁴ *Id.*

⁵⁵ *Id.* at 31:21-:23.

⁵⁶ Cottington Amended Civil Compl. ¶ 22. It was also during this meeting with Andrew that Cottington learned that Henke had directed staff members, including Andrew, not to discuss any details of the meeting at which Cerini's thefts were discussed. Andrew Dep. at 118:19-:25. Henke claimed that although he did not recall being told not to discuss the matter with Cottington, he inferred from Cottington's absence at the Cerini meeting that he should not share the information with her. Henke Dep. at 37-11-:25, 38:1-:8. According to Andrew, she specifically asked Henke afterwards whether Cottington should be informed about the details of the meeting given her position as Treasurer, and Henke replied in the negative. Andrew Dep. at 118:19-:25, 119:1-:5. Andrew also informed Cottington during this discussion that Henke had instructed her and Pearsall not to disclose the falsified contribution scheme to Cottington as well. See Cottington Amended Resp. at 3; Cottington Civil Compl. ¶ 18.

⁵⁷ Andrew Dep. at 35:17-:25, 36:1-:25, 37:1-:20.

⁵⁸ Cottington Civil Compl. ¶ 20.

⁵⁹ *Id.* ¶ 21. Cottington contended that Sher and Stockton agreed that "there was a problem and recommended that because Jean Cottington had been deprived of any control over the process she should step back as Treasurer, and allow Mike Henke to take over responsibility." *Id.*

1 conversation with Stockton, Cottington also expressed concern about her ability to continue to
2 serve effectively as Treasurer, given the situation and her "lack of access to the actual books."⁶⁰

3 On April 18, 2011, ACA terminated Cottington for her inadequate supervision of
4 ACPAC's FEC filings, specifically for her failure to participate in the January and February
5 reconciliation process and for allowing FEC reports to be filed without reviewing them.⁶¹

6 Cottington contended that, because she was unaware of the false information in the reports and
7 "in fact 'blew the whistle'" on the false reporting, she should not be deemed responsible for the
8 improper acts and omissions of Henke and his staff.⁶²

9 After Cottington's termination in April 2011, Valerie Hayes, the then-General Counsel of
10 ACA, assumed the role of Treasurer for ACPAC and initiated an internal review of ACA's
11 accounting practices.⁶³ In June 2011, Hayes filed amended 2010 Post-General and 2010 Year-
12 End reports, deleting those contributions and disbursements associated with the \$23,419
13 discrepancy "once she found no evidence that these contributions or disbursements had been
14 made."⁶⁴

15 C. Cerini's Theft

16 In addition to addressing Henke's activities in connection with the illegal transfer of
17 ACA funds and consequent ACPAC false reporting, the Submission also addresses certain

⁶⁰ *Id.*, ¶ 22.

⁶¹ Hylden May 16, 2012 E-Mail.

⁶² Cottington Amended Resp. at 4.

⁶³ Submission at 5. ACPAC did not file an amended Statement of Organization with the Commission reflecting the change in treasurer from Cottington to Hayes. The Act requires that any change in information previously submitted in a Statement of Organization be reported in accordance with 2 U.S.C. § 432(g) no later than 10 days after the date of the change. 2 U.S.C. § 433(c). Although the Committee failed to comply with that obligation, we recommend that the Commission take no action regarding the Committee's apparent oversight.

⁶⁴ Submission at 5.

1 incorrect disclosure reports ACPAC filed relating to a theft of its funds by another former
2 employee, Marilyn Cerini.⁶⁵ Cerini was ACA's Assistant Controller from March 2003 until her
3 termination on September 29, 2010.⁶⁶ In early 2010, Cerini became responsible for processing
4 and depositing contributions and disbursements for ACPAC and for certain bookkeeping
5 functions.⁶⁷ She was then terminated in September 2010.⁶⁸ After Cerini's termination, ACPAC
6 discovered that between January and May 2010, Cerini had transferred without authorization
7 \$2,950 from ACPAC's online PayPal account to her credit card account.⁶⁹ ACPAC failed to
8 disclose the transfers in its original 2010 reports but has since amended the relevant reports with
9 RAD's assistance.⁷⁰

10 **D. Remedial Measures**

11 ACPAC represents that it has instituted several safeguards designed to prevent further
12 unlawful transfers from ACA, including (1) requiring the accounting staff to conduct monthly

⁶⁵ *Id.* at 1-3.

⁶⁶ *Id.* at 1.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1-2. Specifically, she transferred \$450 on January 5, 2010, \$500 on April 13, 2010, and \$2,000 on May 16, 2010. *Id.*; see Hylden June 11, 2012 E-Mail. In connection with the Cottingham civil action, Henke testified that Cerini may have been responsible for some of the inaccuracies in the records of ACA and ACPAC. Henke Dep. at 73:23-25, 74:1-22.

⁷⁰ See ACPAC, Amended 2010 February Monthly Report (Feb. 22, 2012) (removing \$450 Cerini embezzlement related item); ACPAC, Amended 2010 May Monthly Report (June 28, 2012) (removing \$500 Cerini embezzlement related item); ACPAC, Amended 2010 June Monthly (Mar. 22, 2012) (adding unauthorized credit card refund totaling \$5.00 related to Cerini embezzlement); ACPAC, Amended 2010 Post General Report (June 28, 2012) (adding \$23,419 unlawful transfer); ACPAC, Amended 2010 Year-End Report (June 28, 2012) (adding \$23,419 unlawful transfer). On September 16, 2011, the Committee also amended its 2010 February Monthly and June Monthly reports to include Cerini's theft as Line 15 "offsets to operating expenditures," along with other corrections to reconcile the 2010 reports. Submission at 3. In addition, the Committee noted at that time that it had not yet amended its reports to include the April 14, 2010 misappropriation. *Id.* at 3. Ultimately, with RAD's assistance, ACPAC amended the 2010 February Monthly, May Monthly, June Monthly Reports, Pre-General, Post-General, and Year-End Reports, all filed with the Commission on June 28, 2012.

1 reviews with the Custodian of Records and verify that the activity is appropriate; (2) requiring
2 the accounting department and treasurer or assistant treasurer to review and approve any
3 amendment or correction to the ACPAC ledger and Commission disclosure reports, which must
4 be fully explained in writing; (3) requiring monthly reconciliation of the ACPAC ledger and
5 Commission disclosure reports; (4) developing an internal education program to inform
6 accounting staff and all individuals providing administrative support and oversight of the laws
7 pertaining to federal PAC activity and its protocols; and (5) requiring the treasurer and custodian
8 of records to attend Commission training.⁷¹

9 ACPAC also claims that it has implemented controls to prevent the misappropriation of
10 its funds, including (1) requiring confirmation and approval of disbursements by both the
11 treasurer and assistant treasurer, as well as a manager in ACA's accounting department;
12 (2) prohibiting disbursements from ACPAC using credit card transactions; and (3) requiring that
13 disbursements from ACPAC be made by check, approved by two individuals, and signed by the
14 treasurer or assistant treasurer or other pre-authorized signatories.⁷²

15 III. LEGAL ANALYSIS

16 A. Prohibited Contributions, Contributions in the Names of Others, and the 17 Reporting Obligations of Committees and Treasurers 18

19 The Act prohibits corporations from making contributions to a federal political
20 committee (other than independent expenditure-only political committees)⁷³ and further prohibits

⁷¹ Submission at 5-6.

⁷² *Id.* at 3.

⁷³ See, e.g., Advisory Op. 2010-11 (Commonsense Ten) (concluding that corporations and unions may make unlimited contributions to independent-only political action committees because "independent expenditures do not lead to, or create the appearance of *quid quo pro* corruption") (citing *Citizens United v. FEC*, 558 U.S. 310, 359 (2010)) (emphasis in original).

1 any officer of a corporation from consenting to any such contribution by the corporation.⁷⁴
2 Likewise, a political committee is prohibited from knowingly receiving prohibited
3 contributions.⁷⁵ The Act also provides that "no person shall make a contribution in the name of
4 another person."⁷⁶ That prohibition extends to knowingly permitting one's name to be used to
5 effect the making of a contribution in the name of another or, under the Commission's
6 implementing regulation, to knowingly helping or assisting "any person in making a contribution
7 in the name of another."⁷⁷ The Commission has explained that the provisions addressing those
8 who knowingly assist a conduit-contribution scheme apply to "those who initiate or instigate or
9 have some significant participation in a plan or scheme to make a contribution in the name of
10 another."⁷⁸

11 Political committees must regularly submit to the Commission reports that accurately
12 disclose their receipts, disbursements, and cash-on-hand balances.⁷⁹ Among other requirements,
13 those disclosure reports must specifically identify the cash-on-hand balance at the beginning of
14 the reporting period, the total amount of receipts, and the total amount of disbursements,
15 including the name and address of each person to whom an expenditure exceeding \$200 is made,
16 along with the date, amount, and purpose of the particular expenditure.⁸⁰ The committee's

⁷⁴ 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b), (e). A corporation's solicitation of its executive and administrative personnel for contributions to its separate segregated fund is not considered a contribution or expenditure. *See id.* § 441b(b)(2); 11 C.F.R. §§ 114.1(a)(2)(iii), 114.7(a).

⁷⁵ 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(d).

⁷⁶ 2 U.S.C. § 441f; 11 C.F.R. § 110.4(b)(1)(i).

⁷⁷ 2 U.S.C. § 441f and 11 C.F.R. § 110.4(b)(1)(ii), (iii).

⁷⁸ Explanation & Justification for 11 C.F.R. § 110.4, 54 Fed. Reg. 34,105 (Aug. 17, 1989) ("E&J").

⁷⁹ 2 U.S.C. § 434(b)(1)-(4); 11 C.F.R. § 104.3(a)(1), (b).

⁸⁰ 2 U.S.C. § 434(b)(1), (2), (4), (5), (6)(B).

1 treasurer must sign each disclosure report that the committee files with the Commission.⁸¹ In
2 addition, the Commission has determined that it may deem a current or former treasurer to be
3 party to an enforcement action in her personal capacity where the available information suggests
4 the treasurer "knowingly and willfully violated an obligation that the Act or regulations
5 specifically impose on a treasurer or where a treasurer recklessly failed to fulfill duties imposed
6 by law, or where the treasurer has intentionally deprived himself or herself of operative facts
7 giving rise to the violation."⁸²

8 Finally, the Act prescribes additional monetary penalties for violations that are knowing
9 and willful.⁸³ A violation of the Act is knowing and willful if the "acts were committed with full
10 knowledge of all the relevant facts and a recognition that the action is prohibited by law."⁸⁴ But
11 this does not require proving knowledge of the specific statute or regulation the respondent
12 allegedly violated.⁸⁵ Instead, it is sufficient to demonstrate that a respondent "acted voluntarily
13 and was aware that his conduct was unlawful."⁸⁶ This may be shown by circumstantial evidence

⁸¹ *Id.* § 434(a).

⁸² See Statement of Policy Regarding Treasurers in Enforcement Proceedings, 70 Fed. Reg. 3, 4 (Jan. 3, 2005) (the "Treasurer Policy"); see also Commission Certification ¶ 3, MUR 5652 (Terrell for Senate) (Apr. 5, 2005) (finding reason to believe assistant treasurer violated the Act in her personal capacity where she recklessly failed to fulfill the duties the Act and regulations which gave rise to the Committee's violations in treasurer's absence); Commission Certification ¶ 2, MUR 5652 (Terrell for Senate) (May 1, 2007) (taking no further action as to the assistant treasurer).

⁸³ See 2 U.S.C. §§ 437g(a)(5)(B), 437g(d).

⁸⁴ 122 Cong. Rec. 12,197, 12,199 (May 3, 1976).

⁸⁵ *United States v. Danielczyk*, ___ F. Supp. 2d ___, 2013 WL 124119, *5 (E.D. Va. Jan. 9, 2013) (quoting *Bryan v. United States*, 524 U.S. 184, 195 & n.23 (1998) (holding that, to establish a violation is willful, government needs to show only that defendant acted with knowledge that conduct was unlawful, not knowledge of specific statutory provision violated)).

⁸⁶ *Id.* (citing jury instructions in *United States v. Edwards*, No. 11-61 (M.D.N.C. 2012), *United States v. Acevedo Vila*, No. 08-36 (D.P.R. 2009), *United States v. Fieger*, No. 07-20414 (E.D. Mich. 2008), and *United States v. Alford*, No. 05-69 (N.D. Fla. 2005)).

1 from which the respondents' unlawful intent reasonably may be inferred.⁸⁷ For example, a
2 person's awareness that an action is prohibited may be inferred from "the elaborate scheme for
3 disguising . . . political contributions."⁸⁸

4 1. ACA and ACPAC Liability

5 A principal is liable vicariously for the acts of its agent committed within the scope of
6 agency.⁸⁹ In prior enforcement actions, the Commission has on that basis found that legal
7 entities such as ACA and ACPAC may have violated the Act as a result of the conduct of their
8 officers or employees.⁹⁰

9 Here, Henke engaged in the conduct that violated the Act within his designated areas of
10 responsibility as a member of ACA's senior executive staff. He testified that he worked for
11 ACA since May 1998 as Controller and became Vice-President of Finance in 2004 or 2005.⁹¹
12 His "chief responsibility was for internal financial reporting, managing all the finances and the
13 staff in the accounting area, being the chief lead on the annual financial audit — external audit,

⁸⁷ Cf. *United States v. Hopkins*, 916 F.2d 207, 213 (5th Cir. 1990) (quoting *United States v. Bordelon*, 871 F.2d 491, 494 (5th Cir. 1989)). *Hopkins* involved a conduit contributions scheme, and the issue before the Fifth Circuit concerned the sufficiency of the evidence supporting the defendants' convictions for conspiracy and false statements under 18 U.S.C. §§ 371 and 1001.

⁸⁸ *Id.* at 214-15. As the *Hopkins* court noted, "It has long been recognized that 'efforts at concealment [may] be reasonably explainable only in terms of motivation to evade' lawful obligations." *Id.* at 214 (quoting *Ingram v. United States*, 360 U.S. 672, 679 (1959)).

⁸⁹ In addition, a principal is liable vicariously for the acts of its agent committed within the scope of that agency. RESTATEMENT (THIRD) OF AGENCY § 7.07; see also *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961 (D.C. Cir. 1998) (affirming criminal convictions against Sun-Diamond in connection with a corporate contribution reimbursement scheme where officer hid the scheme from others in corporation but acted to benefit the corporation).

⁹⁰ See, e.g., Factual and Legal Analysis at 7, MUR 6515 (PFFW) (finding reason to believe that a labor union, knowingly and willfully violated 2 U.S.C. §§ 441b and 441f based on the activities of its executive board members); Factual and Legal Analysis, MUR 6143 (Galen Capital) (finding reason to believe that Galen Capital, a corporate entity, knowingly and willfully violated 2 U.S.C. §§ 441b and 441f based on the activities of its Chair and CEO).

⁹¹ Henke Resp. at 1; Henke Dep. at 11:14, 12:9, 13:19-25, 14:1-18. His job responsibilities did not change with his new title. Henke Dep. at 13:19.

1 responsible for all the budgeting.”⁹² In addition, upon the termination of a former employee,
2 Henke became responsible for processing and recording the receipt of contributions in ACPAC’s
3 financial system.⁹³ Cerini had assisted Henke in these specific responsibilities.⁹⁴

4 According to Henke, prior to the termination of Cerini, his only involvement with
5 ACPAC operations was to “print out an internal financial statement, look at the beginning cash
6 on both statements, the FEC report and the financial statement, look at the ending cash, look at
7 the flow-through in the middle, and make sure that those totals balance.”⁹⁵ After Cerini’s
8 termination in April 2010, he volunteered to help oversee the internal auditing process and as
9 such became more involved in Commission reporting issues.⁹⁶ Consequently, Henke had
10 responsibility for managing the financial records for the accounting department as well as the
11 government affairs department in 2010. He had the authority to transfer funds from ACA to
12 ACPAC, and he supervised the staff who he directed to falsify contributions.

13 Henke authorized the \$23,419 transfer from ACA’s corporate account to ACPAC in his
14 capacity as Vice President of Finance for ACA. As noted, Henke claims he authorized the
15 transfer because he was advised by Mularie, a temporary employee, that the funds represented
16 contributions to ACPAC that were mistakenly deposited in ACA’s account. Regardless of his
17 rationale for authorizing the transaction, Henke caused ACA to make a prohibited and excessive
18 corporate contribution to ACPAC acting within his designated area of responsibility as Vice
19 President of Finance for the corporate entity; moreover, in his designated role as ACPAC’s

⁹² *Id.* at 15:2-6.

⁹³ *Id.* at 23:10-25, 24:1-25, 25:1-25.

⁹⁴ *Id.* at 24:3-25, 25:1-12.

⁹⁵ *Id.* at 28:11-16.

⁹⁶ *Id.* at 31:1-25.

1 Assistant Treasurer with responsibility for receiving contributions, he also caused ACPAC to
2 accept that prohibited and excessive contribution.⁹⁷ He further acted with the same authority on
3 behalf of ACA and ACPAC when he later authorized the return of funds from ACPAC to ACA.

4 Because the record reflects that Henke acted as an agent for the benefit of both ACA and
5 ACPAC when engaging in the conduct that violated the Act on behalf of those entities, we
6 recommend that the Commission find reason to believe that ACA, first, violated 2 U.S.C.
7 § 441b(a) and 11 C.F.R. § 114.2(b) by making a prohibited corporate contribution in the amount
8 of \$23,419; and second, violated 2 U.S.C. § 441f and 11 C.F.R. § 110.4(b)(1)(i) by making a
9 contribution in the names of others. For the same reasons, we further recommend that the
10 Commission find reason to believe that ACPAC violated 2 U.S.C. §§ 441b(a) and 441f and
11 11 C.F.R. §§ 114.2(d) and 110.4(b)(1)(iv) by accepting the prohibited, corporate contribution
12 made in the names of others.

13 In addition to its vicarious liability as principal for Henke's acts as its agent, ACPAC is
14 required to file accurate Commission disclosure reports concerning its receipts and
15 disbursements. It failed to do so in relation to the transfer of funds from ACA to ACPAC and
16 their subsequent return to ACA. Accordingly, we further recommend that the Commission find
17 reason to believe that ACPAC violated 2 U.S.C. § 434(b).

18 As noted, to conceal his unlawful transfer from ACA to ACPAC, Henke directed his
19 subordinates to create false records indicating that eight individual contributors were the source

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1 of the funds. Henke claims he did so as a "temporary fix" to account for the transfer in the
2 Committee's disclosure reports, intending that the reports would ultimately be amended and the
3 contributions omitted.⁹⁸ Henke's attempt to conceal the transfer nonetheless reflects that he
4 knew or should have known that his actions were prohibited. And as the agent of ACA and
5 ACPAC acting within the scope of his responsibility, Henke's intent to avoid a known legal duty
6 is imputed by law to the principals on whose behalf he acted.⁹⁹ Although these facts suggest a
7 sufficient basis to support a knowing and willful finding against ACA and ACPAC, we do not
8 recommend that the Commission make such a finding here. Henke affirmatively sought to
9 conceal the existence of the scheme from senior management of ACA, he instructed his staff not
10 to disclose their activities, he caused false entries in ACA and ACPAC records and ledgers to
11 advance the scheme while minimizing the risk of its discovery, and he acted on his sole authority
12 and without the involvement of the Treasurer to make the two transfers between ACA and
13 ACPAC and to file the inaccurate reports with the Commission.¹⁰⁰ Consequently, we do not
14 recommend knowing and willful findings as to ACA and ACPAC for their violations of the
15 Act.¹⁰¹

⁹⁸ We have no information suggesting that the eight individuals whose names were identified in connection with the falsified contributions received any sort of reimbursement or that, other than Andrew, they were even aware of the activity.

⁹⁹ See RESTATEMENT (THIRD) OF AGENCY § 7.07; *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961 (D.C. Cir. 1998) (criminal convictions affirmed against Sun-Diamond in connection with a corporate contribution reimbursement scheme carried out by officer).

¹⁰⁰ Andrew also testified that Cottingham was not invited to attend the meeting discussing Cerini's thefts and the attendees were instructed by Henke not to discuss the details of the meeting with anyone not in attendance. Andrew Dep. at 29:12-:25, 30:1-:12. Henke claimed that although he did not recall being told not to discuss the matter with Cottingham, he inferred from Cottingham's absence at the Cerini meeting that he should not share the information with her. Henke Dep. at 37:11-:25, 38:1-:8. According to Andrew, she specifically asked Henke afterwards whether Cottingham should be informed about the details of the meeting given her position as treasurer, and Henke replied in the negative. Andrew Dep. at 33:13-:17.

¹⁰¹ See Self-Reporting of Campaign Finance Violations (*Sua Sponte* Submissions), 72 Fed. Reg. 16,695, 16,698 (Apr. 5, 2007) (acknowledging that the Commission may "[r]efrain from making a formal finding that a

1 Finally, we note that ACPAC also failed to file accurate disclosure reports as a result of
2 Cerini's embezzlement scheme. The Commission has stated as a matter of policy that it will not
3 seek a monetary penalty against a committee that files inaccurate reports as a result of staff
4 embezzlement so long as the committee had certain internal controls in place at the time of the
5 embezzlement and took certain corrective steps after discovering it.¹⁰² Here, ACPAC lacked the
6 necessary minimal controls to benefit from the Commission-created safe harbor.¹⁰³ Nonetheless,
7 as a matter of prosecutorial discretion, we recommend that the Commission not pursue the
8 reporting violations relating to Cerini's theft, for several reasons. First, the \$2,950 amount at
9 issue is relatively modest. Second, the Committee referred the theft to the appropriate law
10 enforcement authorities and made a *sua sponte* submission to the Commission. Third, the
11 Committee also amended its reports to reflect the misappropriations and has implemented
12 additional controls to prevent future occurrences.¹⁰⁴ As such, we recommend that the
13 Commission take no action as to the Committee's failure to file accurate disclosure reports

violation was knowing and willful, even where the available information would otherwise support such a finding" if an entity makes a *sua sponte* submission concerning a violation of the Act and cooperates in any ensuing investigation of the Commission); *see also* Commission Certification ¶¶ 1-5, MUR 5398 (Lifecare) (Dec. 19, 2003) (finding reason to believe that corporate officers knowingly and willfully violated Act, but not as to the corporate organizations' violations); MUR 5187 (Mattel, Inc.) (same).

¹⁰² See Safe Harbor for Misreporting Due to Embezzlement, 72 Fed. Reg. 16,695 (Apr. 5, 2007).

¹⁰³ For example, Cerini processed contributions, deposits, and disbursements and maintained internal bookkeeping for the Committee's account. Submission at 1. The Committee did not timely or consistently reconcile its account. And the Committee had no fraud prevention controls in place for its checking account. *See* Hylden May 16, 2012 E-Mail (attaching ACPAC Policies and Procedures that outlines prior practices and new practices implemented as a result of the embezzlement).

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1 relating to Cerini's theft of its funds.¹⁰⁵ We further recommend that the Commission take no
2 action as to Cerini in connection with her theft of Committee funds.¹⁰⁶

3 2. The Personal Liability of Michael Henke

4 In Henke's sworn testimony in the civil action, he admitted that he authorized the transfer
5 of funds but claimed a consultant advised him to do it. Whether he acted on another's advice or
6 not, Henke's transfer of corporate funds into the Committee's account resulted in his consenting
7 to the making of a prohibited contribution.

8 Moreover, Henke sought to conceal the Committee's receipt of the prohibited
9 contribution. He directed his subordinates to create false donor records and provided detailed
10 instructions about the steps they were to take to identify those donors and to conceal the transfer.
11 Henke also acknowledged in his sworn deposition that he intended to submit the false
12 information to the Commission and to amend the reports later. Henke's intentional efforts to
13 disguise the transaction, through the use of fabricated donors, with the knowledge that doing so
14 would cause ACPAC to file false disclosure reports that would require later amendments,
15 indicates that Henke knowingly assisted in making a prohibited corporate contribution in the
16 names of others and acted with an appreciation that doing so was prohibited. Accordingly, we
17 recommend that the Commission find reason to believe that Michael Henke knowingly and
18 willfully consented to the making of a prohibited corporate contribution in violation of 2 U.S.C.
19 § 441b(a) and 11 C.F.R. § 114.2(e) and that he knowingly and willfully caused prohibited

¹⁰⁵ See *Heckler v. Cheney*, 470 U.S. 821 (1985).

¹⁰⁶ For the same reasons, we recommend that the Commission take no action as to Cerini for any potential
commingling violations under 2 U.S.C. § 432(b)(3). Nor are there other bases available under the Act to pursue
Cerini; she did not serve as ACPAC's Treasurer, so she had no personal reporting obligations under 2 U.S.C.
§ 434(b), and ACPAC is not an authorized committee, so there is no personal use issue under 2 U.S.C. § 439(a).

1 contributions to be made in the names of others in violation of 2 U.S.C. § 441f and 11 C.F.R.

2 § 110.4(b)(1)(iii)

3 Despite Henke's significant involvement in assembling and filing ACPAC's inaccurate
4 reports with the Commission, we recommend that the Commission take no action as to Henke in
5 connection with ACPAC's reporting violation under 2 U.S.C. § 434(b). The Commission's
6 implementing regulation provides that an assistant treasurer assumes the duties and obligations
7 of the treasurer in the event of the treasurer's temporary or permanent vacancy.¹⁰⁷ But here no
8 temporary or permanent treasurer vacancy occurred — Cottington was the named Treasurer and
9 appears to have fulfilled some of the duties of Treasurer during the relevant period, such as
10 signing and filing the 2010 Post-General and Year-End reports for the Committee. We therefore
11 recommend that the Commission take no action as to Henke's potential violation of 2 U.S.C.
12 § 434(b).¹⁰⁸

¹⁰⁷ 11 C.F.R. § 102.7(a).

¹⁰⁸ The Act and Commission regulations do not provide for the direct liability of an assistant treasurer where a committee has designated a treasurer. The Commission has in past matters approved reason to believe findings against individuals other than treasurers for filing false disclosure reports when the individuals in fact acted in the absence of the treasurer and in a capacity tantamount to that of the treasurer, relying on a *de facto* theory of liability in such cases. See Commission Certification ¶ 3, MUR 5652 (Terrell for Senate) (Apr. 5, 2005) (approving reason to believe findings against an assistant treasurer in her personal capacity based on the theory that she recklessly failed to fulfill duties imposed on treasurers by the Act and regulations which gave rise to the Committee's violations in the treasurer's absence); Commission Certification ¶ 2, MUR 5652 (Terrell for Senate) (May 1, 2007) (taking no further action as to the assistant treasurer); General Counsel's Report #2 at 8-9, MUR 5610 (Dole North Carolina Victory Committee) (approving reason to believe findings against an assistant treasurer for knowing and willful recordkeeping violations where he acted as a *de facto* treasurer in treasurer's absence); see also 2 U.S.C. § 432(a) ("No expenditure shall be made . . . without the authorization of the treasurer or his or her designated agent." (emphasis added)); 11 CFR § 102.7(a) (permitting the designation of an assistant treasurer)). We recommend that the Commission take no action as to Henke, however, for the reason stated above: notwithstanding Cottington's apparently minimal engagement in making the filings at issue and Henke's apparent concealment of his activities, Cottington remained ACPAC's designated Treasurer throughout the relevant period and Henke had not assumed the role on a *de facto* basis in her absence.

3. Potential Liability of Other Individuals

As a matter of policy, the Commission has concluded that it may consider treasurers or former treasurers a party to enforcement proceedings in their personal capacities where information "indicates that the treasurer knowingly and willfully violated an obligation that the Act or regulations specifically impose on a treasurer or where a treasurer recklessly failed to fulfill duties imposed by law, or where the treasurer has intentionally deprived himself or herself of operative facts giving rise to the violation."¹⁰⁹

Here, the circumstances do not warrant pursuing Cottington in her personal capacity for her activities while Treasurer. Cottington has stated that she was told upon assuming her position that Henke would act as Assistant Treasurer with responsibility for assembling disclosure reports for her review and filing, as he possessed the requisite accounting and financial background and had access to the necessary financial documents. Cottington further stated that she was not afforded access to the Committee's financial and accounting documents during her tenure as Treasurer. In addition, Cottington asserted that there was no reasonable avenue available to her to detect the fraudulent contribution information contained in the reports, given Henke and his staff's independent effort to conceal the fraud and her lack of access to the underlying financial documents that might have revealed it.

Both Andrew and Henke testified that Cottington was not present at the meeting during which Cerini's theft was discussed.¹¹⁰ Andrew testified that she specifically asked Henke if she should relay the details of the meeting to Cottington and he replied in the negative. Henke agreed that he inferred from her absence that she was not to be made privy to the details of the

¹⁰⁹ See Treasurer Policy, 70 Fed. Reg. 3, 4 (Jan. 3, 2005).

¹¹⁰ Andrew Dep. at 29:12-25, 30:1-12; Henke Dep. at 37:11-25, 38:1-8

1 meeting. Further, it appears that Henke concealed from Cottingham the prohibited corporate
2 transfer, his efforts to conceal that transfer by directing his staff to create false contributions, and
3 the inclusion of that false information in the Committee's disclosure reports. Andrew also
4 testified that nothing on the face of the reports Henke presented to Cottingham would have alerted
5 her to the false information they contained. Moreover, Cottingham asserted that Henke filed
6 certain amended reports with the Commission without her knowledge or review, using her
7 Commission-issued password to file the reports under her electronic signature.

8 Based on the record presently before the Commission — which includes not only the
9 submissions of the named parties but also Henke's deposition transcript and the sworn
10 statements of others with personal knowledge of the scheme — we conclude that substantial
11 evidence indicates that Henke and his staff took steps directed specifically at concealing
12 information from Cottingham that would have been necessary to her in the proper performance of
13 her duties as Treasurer. To be sure, a treasurer is obligated to take reasonable steps to determine
14 that reports filed under the treasurer's name are accurate, and under Commission policy may be
15 liable personally for failing to do so.¹¹¹ But here, Cottingham did review those disclosure reports
16 that she was aware were being filed under her name, and the record amply shows that the
17 Committee staff who engaged in the fraudulent conduct proactively concealed the false nature of
18 the reports from her. Further, although she was unable to address conduct that she was unaware
19 had occurred, when she later learned about Henke's activities in April 2011, it appears that she
20 took action immediately: she alleges that she reported the problem the President and Vice-
21 President of ACA and stated that she could not serve in the capacity of Treasurer without full

¹¹¹ Treasurer Policy, 70 Fed. Reg. 3, 4-5 (Jan 3, 2005).

1 access to ACPAC's records.¹¹² Accordingly, we recommend that the Commission take no action
2 regarding Jean Cottington in her personal capacity as to potential violations of 2 U.S.C.
3 §§ 434(b), 441b, and 441f.¹¹³

4 The record further reflects that other members of the Committee staff, specifically
5 Andrew and Pearsall, engaged in the conduct giving rise to the violations at issue here.¹¹⁴ They
6 did so, however, solely in their capacity as subordinate staff employees under Henke's direction.
7 In addition, neither of these individuals was responsible for filing reports containing false
8 information. Although following the orders of a supervisor is no legal defense to liability, the
9 Commission has previously concluded in matters involving schemes to make contributions in the
10 names of others that it would not pursue subordinate-level employees who engaged in the
11 conduct at the direction of their employers.¹¹⁵ Since neither individual was notified as a potential
12 respondent, we make no recommendation as to Andrew and Pearsall for their role in assisting in
13 the making of contributions in the names of others under Henke's supervision and direction.

14 Further, due to the *de minimis* amount of money involved and her subordinate status to
15 Henke, we also make no recommendation regarding Andrew's use of her name in connection
16 with the \$250 contribution that was unrelated to the larger false contribution scheme.

17

¹¹² Cottington Amended Civil Compl. ¶¶ 25-27.

¹¹³ See *Heckler v. Cheney*, 470 U.S. at 821; Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007) (recognizing that the Commission has broad discretion to taking no action in matters that it concludes do not merit the additional expenditure of Commission resources).

¹¹⁴ As previously noted, neither Andrew nor Pearsall were notified as potential respondents by CELA.

¹¹⁵ See e.g., Commission Certification ¶ 2, MUR 6143 (Galen Capital) (July 1, 2013) (taking no action against the class of conduits who were lower-level employees, subordinate employees who were not active participants, and family members of employees).

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V. RECOMMENDATIONS

1. Open a Matter Under Review.
2. Find reason to believe that ACA International violated 2 U.S.C. §§ 441b(a) and 441f and 11 C.F.R. §§ 110.4(b)(1)(i) and 114.2(b).
3. Find reason to believe that ACPAC ACA International Political Action Committee and Rae Ann Bevington in her official capacity as treasurer violated 2 U.S.C. §§ 434(b), 441b(a), and 441(f) and 11 C.F.R. § 110.4(b)(1)(iv) and 114.2(d).
4. Find reason to believe that Michael Henke knowingly and willfully violated 2 U.S.C. §§ 441b(a) and 441f; and 11 C.F.R. §§ 114.2(e) and 11 C.F.R. § 110.4(b)(1)(iii).
5. Take no action as to Michael Henke with regard to 2 U.S.C. § 434(b).

6. Take no action as to Jean Cottington in her personal capacity with regard to 2 U.S.C. §§ 434(b), 441b(a), and 441f.
7. Take no action as to ACPAC ACA International Political Action Committee and Rae Ann Bevington in her official capacity as treasurer with regard to the possible inaccurate reporting as a result of Cerini's theft of funds.
8. Take no action as to Marilyn Cerini with regard to the theft of Committee funds.
9. Enter in conciliation with ACA International, ACPAC ACA International Political Action Committee and Rae Ann Bevington in her official capacity as treasurer, and Michael Henke prior to a finding of probable cause to believe
10. Approve the attached Factual and Legal Analyses.
11. Approve the appropriate letters.
12. Close the file as to Jean Cottington and Marilyn Cerini.

Date

7/24/14

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